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No. 89-590

In The

Supreme Court of the United States

October Term, 1989

DUANE WILKINSON,

Petitioner,

v.

SAFEWAY STORES, INCORPORATED, a Delaware Corporation, LESTER COLLINS, and THOMAS BRADDY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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List of Parties

The parties to this proceeding are: Petitioner, DUANE WILKINSON, and respondents SAFEWAY STORES, INCORPORATED, a Delaware Corporation, LESTER COLLINS and THOMAS BRADDY. The Subsidiaries and affiliated companies of SAFEWAY STORES, INCORPORATED other than those which are wholly owned, are:

Controladero de Empresas del Noroestre S.A. De D.V. (Mexico)

Property Development Associates

Winthrop Partnership

Markwind Limited Partnership

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 1

I The Memorandum decision below is not in conflict with previous decisions of this Court, decisions of other circuits, or decisions of the Ninth Circuit 1

II The first question presented by petitioner does not seek resolution of any issue of conflict or confusion among the Circuit Courts, but rather asks this Court to reexamine and review its settled decisions in *Allis-Chalmers* and *Lingle* 5

III The second question presented by petitioner has already been answered by this Court's decisions in *Allis-Chalmers* and *Lingle* 8

IV The Memorandum decision correctly applied the Section 301 preemption principles set forth in *Allis-Chalmers* and *Lingle* 10

V CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). *passim*

Arizona v. Rumsey, 467 U.S 203 (1984) 6

Boy's Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970) 6

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 6

DeSoto v. Yellow Freight Systems, Inc., 811 F.2d 1333 (9th Cir. 1987) 12

Evangelista v. Inland Boatman's Union of Pacific, 777 F.2d 1390 (9th Cir. 1985) 12

Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) 3, 4, 5, 9, 12

Lingle v. Norge Division of Magic Chef, Inc., 108 S.Ct. 1877 (1988). ..... *passim*

Newberry v. Pacific Racing Ass'n, 854 F.2d 1142 (9th Cir. 1988) 7. 8

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 9

Paige v. Henry J. Kaiser Co., 826 F.2d 857, *cert. denied*, 108 S.Ct. 2819 (1988) 2, 4, 5, 12

Patterson v. McClean Credit Union, 109 S.Ct. 2263 (1989) 6

Rodriguez de Quijas v. Shearson American Express, Inc., 109 S.Ct. 1917 (1989). 6

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 6

TABLE OF AUTHORITIES – Continued

Page

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 6, 8

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) ...6, 8

STATUTES

Labor Management Relations Act, Section 301 (29 U.S.C. § 185) 2, 5, 7, 9, 10

OTHER AUTHORITIES

United States Court of Appeals for the Ninth Circuit

Rule 36-1 5

Rule 36-2 5

Rule 36-3 5

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Respondents, SAFEWAY STORES, INCORPORATED, LESTER COLLINS, and THOMAS BRADDY, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's Memorandum decision in this case.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the Memorandum decision below.

REASONS WHY THE PETITION SHOULD BE DENIED

I The Memorandum decision below is not in conflict with previous decisions of this Court, decisions of other circuits, or decisions of the Ninth Circuit.

Petitioner asserts that because the Section 301 preemption analysis in the Memorandum decision below is not solely based upon the "require" language of *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), it is in conflict with that ruling. By reason that the Ninth Circuit also applied the "substantially dependent upon" language of this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), petitioner contends the Memorandum decision fails to follow the holding in *Lingle*. According to petitioner, *Lingle* provides the dispositive analysis to be applied in determining the preemptive scope of Section 301 on state law.[1]

Such an interpretation of *Lingle* is without support. *Lingle* did not overrule *Allis-Chalmers* on the standard of Section 301 preemption as petitioner suggests. *See* Section II, *Infra*. *Allis-Chalmers* is cited and relied upon by this Court in *Lingle*, and the opinion makes it clear that there is nothing inconsistent or novel about the result reached. 108 S.Ct at 1884. In applying both decisions therefore, the decision below in no way conflicts with any decision of this Court.

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[1] It remains, of course, a paradox as to how petitioner can assert this interpretation of *Lingle*, while admitting that it is without support by asking this Court in his first question presented to determine whether the *Lingle* analysis or the *Allis-Chalmers* analysis is the "dispositive" inquiry.

The petitioner further contends that the Ninth Circuit's Memorandum decision is in conflict with the decisions of other circuits. However, no other decision by any other circuit court of appeal is cited by petitioner in support of his contention.

Turning to previous decisions within the Ninth Circuit, petitioner cites *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) and *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, *cert. denied*, 108 S.Ct. 2819 (1988) as conflicting with the decision below. As more fully discussed in Section III *infra*, *Garibaldi* does not stand as an exception to this Court's decisions in *Allis-Chalmers* and *Lingle* on the preemptive scope of Section 301. Rather, the "public policy" exception discussed in *Garibaldi* allows a state law wrongful termination cause of action only if it does not require or is not substantially dependent upon an analysis of the applicable collective bargaining agreement at issue. As the plaintiff's wrongful termination cause of action in *Garibaldi* was squarely based upon his refusal to deliver spoiled milk in violation of California statutory law, no analysis of his collective bargaining agreement was required, and the claim was not preempted. The decision is clearly not inconsistent with the Ninth Circuit's analysis in the decision below.[2]

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[2] Indeed, the *Garibaldi* Court specifically noted that: "In contrast, if Garibaldi had alleged that he was terminated in violation of the collective bargaining agreement, or . . . in violation of an implied covenant of good faith and fair dealing the result might be otherwise." 726 F.2d 1367 at 1374 (citation and footnote omitted.) Petitioner has pleaded both these causes of action.

The *Paige* decision is also consistent with the Memorandum decision. The appellant's cause of action in *Paige* for breach of contract was held preempted because, as in petitioner's action, it was based upon the breach of a collective bargaining agreement. The appellant's cause of action for wrongful discharge in violation of public policy based upon the statutory provisions of Cal/OSHA was found not preempted by Section 301 pursuant to the decision in *Allis-Chalmers*. The *Paige* Court found that: "[t]he resolution of appellants' wrongful discharge claim- . . . depends upon an analysis of Cal/OSHA and California tort law. Since it is not intertwined or substantially dependent upon consideration of the terms of the labor contract, it is not preempted by Section 301." 826 F.2d at 863.

In contrast to *Garibaldi* and *Paige*, the decision below found that petitioner's "public policy" claim based upon alleged timecard violations required an interpretation of the collective bargaining agreement provisions covering such issues, and therefore was preempted under *Lingle* and *Allis-Chalmers*. Accordingly, no conflict exists between the standard of Section 301 preemption analysis applied by the Ninth Circuit in the decision below and the analysis applied in its previous decisions. The differences in the outcome of *Garibaldi* and *Paige* from the decision below are simply based on fact, and do not require resolution by this Court[3]

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[3] As specifically noted by Justice Blackmun in *Allis-Chalmers, supra*: "The full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a case by case basis." 471 U.S. at 220.

In addition to the lack of conflict in any area raised by the Memorandum decision, it is obvious that the decision is an unpublished disposition pursuant to Rule 36-1 of the Rules of the United States Court of Appeals for the Ninth Circuit. *See* page 1A *infra*. A written, reasoned disposition of a case or motion which is not intended for publication under Rule 36-2 (disposition by opinion) is a Memorandum. *See* page 1A-2A *infra*. Pursuant to Rule 36-3 (page 2A *infra*), Memorandums are not regarded as precedent and cannot be cited to or by the Ninth Circuit or any district court of the Ninth Circuit in briefs, oral argument, opinions, memorandum or orders.

The decision below, therefore, is of no precedential value. Even assuming *arguendo* petitioner's allegations of conflict are valid, the decision below cannot be relied upon or cited as a decision inconsistent with the opinions in *Paige* and *Garibaldi*. Accordingly, the dispute is limited solely to the parties, and does not constitute an issue necessitating this Court's authoritative voice.

II The first question presented by petitioner does not seek resolution of any issue of conflict or confusion among the circuit courts, but rather asks this Court to reexamine and review its settled decisions in *Allis-Chalmers* and *Lingle*.

The first question as presented by petitioner asks this Court to choose between the preemptive scope analysis set forth in *Allis-Chalmers*, which holds claims are preempted by Section 301 if they are "substantially dependent upon" the interpretation of a collective bargaining agreement, and the analysis in *Lingle*, which holds such

claims are preempted if they "require" the interpretation of a collective bargaining agreement. Resolution of this question as phrased contemplates an overruling of the analysis of one or both of the decisions.

To depart from the doctrine of *stare decisis* requires substantial justification, especially in the area of statutory interpretation such as in the case at hand. *Patterson v. McClean Credit Union*, 109 S.Ct. 2263, 2370 (1989) *quoting Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Substantial justification, as defined by this Court, requires that: (1) The decision must be undermined by subsequent changes or developments in the law, *Patterson, supra* at 2370-71; (2) The decision must be irreconcilable with competing doctrines or policies, *Id.*; (3) The decision must be a positive detriment to coherence and consistency in the law because of confusion created by an unworkable decision, *Patterson, supra*, citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977); *Swift & Co. v. Wickham*, 382 U.S. 111, 124-25 (1965), and (4) The decision poses a direct obstacle to the realization of important objectives embodied in other laws. *Patterson, supra*, citing *Rodriguez de Quijas v. Shearson American Express, Inc.*, 109 S.Ct. 1917 (1989); *Boy's Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 240-41 (1970).

In the labor law area, the foregoing criteria must also be examined in light of the overall Congressional and federal policy to promote a uniform body of federal labor law, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and to promote the peaceable and consistent resolution of labor management disputes, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

In view of these considerations, no sufficient reason is given as to why certiorari should be granted on the issues raised in petitioner's first question. Absolutely no showing is made that the rulings in *Allis-Chalmers* and *Lingle* on the issue of Section 301 preemption have been undermined by subsequent changes or developments in the law or are irreconcilable with competing doctrines or policies. Similarly, no evidence in the record exists to show that the decisions pose an obstacle to objectives embodied in other laws.

The strongest argument implicit in petitioner's first question is that the decisions are a detriment to coherence and consistency in the law by creating an unworkable standard. However, the practical application of *Allis-Chalmers* and *Lingle* by the Ninth Circuit belies this assertion. In *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir. 1988), the Ninth Circuit was directly confronted with the question of Section 301 preemption of state tort law claims and the same argument petitioner makes that such claims existed separate from the plaintiff's collective bargaining agreement. In determining the proper standard of analysis, the Ninth Circuit stated:

> We recognize that Section 301 does not preempt every employment dispute tangentially involving the labor agreement, *Lingle*, ___ U.S. ___ at ___, 108 S.Ct. at 1881-83, and will proceed to analyze the appellant's contentions under the Supreme Court's twin tests, without indicating or suggesting that the tests do in fact differ: Does the application of State law 'require [the] interpretation of a collective bargaining agreement,' *Lingle*, ___ U.S. at ___, 108 S.Ct. at 1885, or 'substantially depend [upon] the terms of an agreement made between the parties in a labor

contract?' *Allis-Chalmers*, 471 U.S. at 220, 105 S.Ct. at 1916.

854 F.2d at 1147.

Newberry demonstrates that the intervention of this Court sought by petitioner's first question is unnecessary as a matter of law, and also as measured against the import of issues in the labor law area where certiorari has traditionally been granted.

As to the merits of petitioner's action, *Newberry* was specifically applied in the decision below, and a consistent result was reached.[4] Clearly, the Ninth Circuit has adopted both rulings which, of course, are predicated upon the perpetuation of underlying federal labor law principles originally set forth in *Lincoln Mills* and *Lucas Flour*. No resulting detriment to the coherence and consistency in the application of Section 301 preemption to state law claims is raised by this petition. In sum, there is absolutely no reason why this Court should issue a writ of certiorari to resolve the first question presented by petitioner.

III The second question presented by petitioner has already been answered by this Court's decisions in *Allis-Chalmers* and *Lingle*.

The Section 301 preemption analyses set forth in *Allis-Chalmers* and *Lingle*, based upon the long-standing federal labor law principles in *Lincoln Mills* and *Lucas Flour* govern the viability of any state law claim where

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[4] The correctness of the Memorandum decision is discussed in Section IV, *infra*.

the provisions of a collective bargaining agreement are implicated. Whether the state law claims are pleaded under contract, tort, or "public policy" theories is irrelevant to the application of preemption analysis. The overriding question of whether a state action is preempted by federal law is one of Congressional intent, not the nature of the state action. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Allis-Chalmers, supra* at 208.

Contrary to the implications raised in petitioner's second question presented, *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) does not operate as a separate exception to Section 301 preemption. Although *Garibaldi* was decided prior to this Court's decisions in *Allis-Chalmers* and *Lingle*, the decision was predicated upon the same preemption analysis traditionally employed to determine Congressional intent concerning the state law in question. *Garibaldi, supra*, 726 F.2d at 1372-76. No action is therefore required of this Court to determine an area of law that it has already settled.

An argument similar to that raised by petitioner herein was raised in *Lingle*. In *Lingle*, the petitioner argued that the Illinois right to be free from retaliatory discharge was non-negotiable, and applied to both unionized and non-unionized workers. In response to the assertion that such a state right would automatically escape the preemptive scope of Section 301, this Court stated:

> While it may be true that most state laws that are not preempted by § 301 will grant non-negotiable rights that are shared by all state workers, we note that neither condition insures

> nonpreemption. It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective bargaining agreement interpretation, the application of the law in those instances would be preempted. Conversely, a law could cover only unionized workers but remain unpreempted if no collective bargaining agreement interpretation was needed to resolve claims brought thereunder.

108 S.Ct. 1882, n.7.

Clearly, there is no basis in the law for the petitioner's proposition that a state tort cause of action based upon "public policy" can exist simultaneously if the resolution of the claim would require or be substantially dependent upon the interpretation of the applicable collective bargaining agreement at issue. The second question presented merely seeks to resolve the same issues presented to and previously adjudicated by this Court in *Allis-Chalmers* and *Lingle*.

IV The Memorandum decision correctly applied the Section 301 preemption principles set forth in *Allis-Chalmers* and *Lingle*.

The issues raised by petitioner in the questions presented need not be resolved to determine that the Memorandum decision of the Ninth Circuit was rendered in accordance with the established precedent of this Court.

Petitioner simply continues to seek appellate relief from the allegations of his own Complaint, which clearly predicate each and every cause of action upon an alleged breach of his collective bargaining agreement. A review of the Memorandum decision (Appendix 1A-11A in the Petition) finds that each cause of action was specifically addressed and analyzed by the Ninth Circuit according to the "require" language of *Lingle* and the "substantially dependent upon" language of *Allis-Chalmers*.

Under the *Lingle* standard, which is arguably more stringent than that set forth in *Allis-Chalmers*, the Ninth Circuit found that each and every cause of action *required* an interpretation of petitioner's collective bargaining agreement and was therefore preempted under Section 301. Thus, petitioner's first question is wholly irrelevant to the merits of his action, as his state contract and tort claims were found preempted under the stricter requirements of *Lingle*, and would necessarily be preempted under the less stringent *Allis-Chalmers* standard.

Moreover, as set forth by respondents in their argument to the Ninth Circuit, petitioner's allegations of violations of public policy based upon California penal statutes were not alleged in his Complaint. Allegations that petitioner was acting to effectuate such statutory provisions were first asserted on his appeal to the Ninth Circuit. Petitioner's claims of wrongful termination are solely based upon breach of contract and breach of the implied covenant of good faith and fair dealing. Accordingly, allegations of wrongful termination in violation of public policy are not properly in the record nor are they properly before this Court.

Even assuming *arguendo* that the issue is properly before this Court, petitioner cannot maintain a cause of action for wrongful termination, as he has failed, unlike the plaintiffs in *Garibaldi* and *Paige*, to allege a cause of action for tortious wrongful discharge or any violation of public policy involving state interest inuring to the benefit of the public in general. *See DeSoto v. Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987) (Plaintiff must act in defense of a public policy of the State of California and not simply assert his own interpretation of the law.) Petitioner's alleged violation of timecard procedures rather, is clearly encompassed within the terms of his collective bargaining agreement. *See also Evangelista v. Inland Boatman's Union of Pacific*, 777 F.2d 1390 (9th Cir. 1985). The decision below correctly and fairly found petitioner's causes of action preempted by Section 301 according to the precedent of this Court. Accordingly, none of the traditional circumstances in which certiorari is granted are present, and the petition should be denied.

V CONCLUSION

For these reasons the Petition for Writ for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Rule 36-1. Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Rule 36-2. Disposition by Opinion

A written, reasoned disposition shall be designed as an OPINION only if it:

(a) Establishes, alters, modified or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Rule 36-3. Other Dispositions

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.